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IN THE COURT OF APPEALS OF INDIANA

TIMOTHY J. KOWALSKI,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 18A02-0604-PC-331
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne L. Vorhees, Judge
Cause No. 18C01-0212-FC-53

January 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Timothy Kowalski, *pro se*, appeals the denial of his petition for post-conviction relief (PCR). By failing to raise the issue on direct appeal, he has waived post-conviction review of the imposition of a drug interdiction fee. Because the decision in his direct appeal had been handed down but not yet certified as final when *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied* 542 U.S. 961 (2004), was decided, Kowalski was entitled to challenge his sentence under *Blakely*. However, he forfeited this claim because he did not add a *Blakely* claim by amendment, on petition for rehearing, or on petition to transfer. Moreover, he was not denied effective assistance of trial or appellate counsel. Because counsel is not required to anticipate changes in the law to be deemed effective, counsel's performance was not deficient. Because the trial court may consider misdemeanor convictions during sentencing, counsel's failure to argue a contrary position was not deficient performance.

We affirm.

FACTS AND PROCEDURAL HISTORY

In September 2003, Kowalski pled guilty to reckless homicide as a Class C felony,[1] dealing in marijuana as a Class D felony,[2] and failure to appear as a Class D felony.[3] The plea agreement left sentencing to the discretion of the court. The trial court sentenced Kowalski to eight years for reckless homicide, three years for dealing in marijuana, and three years for failure to appear, and ordered the sentences to be served

[1] Ind. Code § 35-42-1-5.
[2] Ind. Code § 35-48-4-10(a)(2).
[3] Ind. Code § 35-44-3-6. After posting bond for reckless homicide and dealing in marijuana, Kowalski fled to California.

consecutively for an aggregate sentence of fourteen years. We affirmed his sentence. *Kowalski v. State*, No. 18A02-0311-CR-994 (Ind. Ct. App. June 11, 2004). On February 1, 2005, Kowalski filed a *pro se* petition for post-conviction relief and subsequently amended it. The post-conviction court denied his petition after a hearing.

DISCUSSION AND DECISION

Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002), *reh'g denied*. Rather, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Davidson v. State*, 763 N.E.2d 441, 443 (Ind. 2002), *reh'g denied, cert. denied* 537 U.S. 1122 (2003); *see also* Ind. Post-Conviction Rule 1(1)(a). If an issue was known and available but not raised on direct appeal, it is waived for purposes of post-conviction relief. *Williams v. State*, 706 N.E.2d 149, 153 (Ind. 1999), *reh'g denied* 718 N.E.2d 737, *cert. denied* 529 U.S. 1113 (2000). Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. P-C.R. 1(5).

When a petitioner appeals the denial of post-conviction relief, he appeals from a negative judgment. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). Consequently, we may not reverse the post-conviction court's judgment unless the petitioner demonstrates that the evidence "as a whole, leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Id.*

The post-conviction court is required to make specific findings of fact and conclusions of law on all issues presented. P-C.R. 1(6). We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not give deference to the post-conviction court's conclusions of law. *Davidson*, 763 N.E.2d at 443-44. On appeal, we examine only the probative evidence and reasonable inferences that support the post-conviction court's determination. *Conner v. State*, 711 N.E.2d 1238, 1245 (Ind. 1999), *cert. denied* 531 U.S. 829 (2000). We do not reweigh the evidence or judge the credibility of the witnesses. *Id.*

Kowalski argues the trial court could not impose a drug interdiction fee as part of his sentence because he is indigent, he is entitled to challenge his sentence under *Blakely*, and he was denied effective assistance of trial and appellate counsel.

1. Drug Interdiction Fee

The trial court ordered Kowalski to pay a $200 drug interdiction fee. Kowalski did not challenge this fee on direct appeal although the fee was part of the sentencing order. The post-conviction court correctly concluded he waived this claim.[4] *See Williams*, 706 N.E.2d at 153.

2. *Blakely*

Kowalski argues he is entitled to challenge his sentence under *Blakely*. We decided Kowalski's direct appeal on June 11, 2004. Less than two weeks later, on June 24, 2004, the United States Supreme Court issued *Blakely*. Our decision was certified as

[4] Nevertheless, the post-conviction court found, "in the alternative . . . Kowalski is indigent as to court costs and the interdiction fee and should not be incarcerated for his failure to pay the same." (App. at 173.)

final on July 20, 2004. On March 9, 2005, our Indiana Supreme Court decided *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005), *cert. denied* --- U.S. ---, 126 S. Ct. 545 (2005), holding portions of Indiana's sentencing scheme violated a defendant's right to trial by jury in light of *Blakely*.

The *Smylie* court concluded it would be "appropriate to be rather liberal in approaching whether an appellant and her lawyer have adequately preserved and raised a *Blakely* issue." 823 N.E.2d at 690. Subsequently, the court explained it had:

> relaxed the rule that a particular sentencing claim must be raised in an appellant's initial brief on direct appeal in order to receive review on the merits. For cases in which the appellant's initial brief on direct appeal was filed prior to the date of the *Smylie* decision (March 9, 2005), an appellant who had contested his or her sentence in some respect in the appellant's initial brief on direct appeal is entitled to review on the merits of a subsequently-raised *Blakley* claim. (The keys here are that (1) some sentencing claim must have been raised in the appellant's initial brief on direct appeal and (2) the appellant must have added a *Blakely* claim by amendment, on petition for rehearing, or on petition to transfer.)

Kincaid v. State, 837 N.E.2d 1008, 1010 (Ind. 2005) (internal citations and footnote omitted).

Under the liberal approach set forth by our Indiana Supreme Court, it appears Kowalski could have added a *Blakely* claim in a petition for rehearing or petition to transfer. *See id.* However, Kowalski requested neither rehearing or transfer, nor did he add a *Blakely* claim. Accordingly, Kowalski has forfeited his challenge under *Blakely*. *See id.* ("The keys here are that . . . the appellant must have added a *Blakely* claim by amendment, on petition for rehearing, or on petition to transfer.").

3. Assistance of Counsel

Kowalski argues he was denied effective assistance of both trial and appellate counsel.[5] To establish a violation of the Sixth Amendment right to effective assistance of trial counsel, a defendant must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied* 467 U.S. 1267 (1984). *Wesley v. State*, 788 N.E.2d 1247, 1252 (Ind. 2003), *reh'g denied*. First, a defendant must show defense counsel's performance was deficient. *Id.* This requires showing counsel's representation fell below an objective standard of reasonableness and counsel made errors so serious that he was not functioning as "counsel" guaranteed to the defendant by the Sixth Amendment. *Id.* The objective standard of reasonableness is based on "prevailing professional norms." *Id.*

Second, a defendant must show the deficient performance prejudiced the defense. *Id.* This requires showing counsel's errors were so serious as to deprive the defendant of a fair trial, *e.g.*, a trial whose result is reliable. *Id.* To establish prejudice, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

"If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697. However, "there are occasions when it is appropriate to resolve a post-conviction case by

[5] The same attorney handled Kowalski's case at trial and on appeal.

a straightforward assessment of whether the lawyer performed within the wide range of competent effort that *Strickland* contemplates." *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006).

A claim of ineffective assistance of appellate counsel incorporates the *Strickland* standard, requiring a defendant to show both deficient performance and prejudice. *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh'g denied, cert. denied* 525 U.S. 1021 (1998).

When we analyze claims based on a failure to raise issues on appeal, we must be especially deferential to counsel's decision because deciding which issues to raise "is one of the most important strategic decisions to be made by appellate counsel." *Id.* at 193. The defendant must demonstrate "from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy." *Ben-Yisrayl v. State*, 738 N.E.2d 253, 260-61 (Ind. 2000), *reh'g denied, cert. denied* 534 U.S. 1164 (2002) (internal citations omitted). In addition to being significant and obvious, the unraised issues must be "clearly stronger" than the issues counsel raised. *Bieghler*, 690 N.E.2d at 194.

Even if appellate counsel's choice of issues was not reasonable, the defendant's claim will not prevail unless he can demonstrate a reasonable probability that the outcome of the direct appeal would have been different. *Thompson v. State*, 793 N.E.2d 1046, 1051-52 (Ind. Ct. App. 2003).

A. Appellate Counsel

Kowalski's argument regarding appellate counsel is related to his *Blakely* claim.[6] He admits "his court-appointed appellate counsel failed to petition for rehearing or transfer." (Br. of Appellant at 13.) However, he argues he "is entitled to raise a *Blakely* claim because . . . Kowalski should not be penalized for his court-appointed counsel's ineffectiveness." (*Id.*) Kowalski argues counsel did not "act with reasonable diligence," *see* Ind. Professional Conduct Rule 1.3, when he failed to request rehearing or transfer, "[d]espite the significance of the *Blakely* decision and its obvious impact on criminal sentences." (Br. of Appellant at 11.) He asserts counsel's "inactions severely prejudiced Kowalski, specifically as to his *Blakely* claim." (*Id.* at 12.)

To evaluate counsel's performance,[7] we consider 1) whether the unraised issues are significant and obvious from the face of the record, and 2) whether the unraised issues are "clearly stronger" than the raised issues. *Timberlake v. State*, 753 N.E.2d 591, 605-06 (Ind. 2001). Specifically, we must determine whether challenging Kowalski's sentence under *Blakely* was a significant and obvious issue at the time. Under the facts of this case, we conclude it was not.

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[6] Kowalski also asserts appellate counsel was ineffective because he did not cite three cases related to the enhancement of sentences based solely on misdemeanor convictions. We address this argument in our discussion of assistance of trial counsel.

[7] Ineffective assistance of appellate counsel claims generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Fisher v. State*, 810 N.E.2d 674, 677 (Ind. 2004); *Bieghler*, 690 N.E.2d at 193-95. Failure to seek rehearing or transfer in this case resulted in forfeiture of Kowalski's *Blakely* claim and, accordingly, we evaluate the claim as a waiver of issues.

In deciding what is sufficient to preserve a *Blakely* claim, our Indiana Supreme Court has stated:

> Because *Blakely* represents a new rule that was sufficiently novel that it would not have been generally predicted, much less envisioned to invalidate part of Indiana's sentencing structure, requiring a defendant or counsel to have prognosticated the outcome of *Blakely* or of today's decision would be unjust.
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> [A] trial lawyer or an appellate lawyer would not be ineffective for proceeding without adding a *Blakely* claim before *Blakely* was decided.

Smylie, 823 N.E.2d at 689, 690. An attorney is not required to anticipate changes in the law and object accordingly in order to be effective. *Id.* at 690. Issues raised for the first time on rehearing or transfer are usually considered waived. *Carson v. State*, 813 N.E.2d 1187, 1188-89 (Ind. Ct. App. 2004). It was reasonable for counsel to presume a claim raised for the first time on rehearing or transfer would be waived. Counsel was not ineffective for failing to anticipate our Indiana Supreme Court's decision in *Smylie* and its course of liberal *Blakely*-claim preservation. Kowalski has not demonstrated appellate counsel was ineffective.

B. Trial Counsel

Kowalski raises three issues under the rubric of ineffective assistance of trial counsel. He first refers to trial counsel's "incomprehension of the Indiana sentencing code as it pertains to concurrent and consecutive sentences." (Br. of Appellant at 6.) Specifically, Kowalski claims counsel told him his exposure under the plea agreement

was ten years and not eleven years.[8] However, as the State points out, Kowalski has waived this specific issue by failing to raise and argue it to the post-conviction court. *See Johnson v. State*, 832 N.E.2d 985, 996 (Ind. Ct. App. 2005) (issues not raised in the petition for post-conviction relief are waived and may not be raised for the first time on post-conviction appeal), *trans. denied* 841 N.E.2d 191 (Ind. 2005).

Kowalski's second claim of ineffective assistance of trial counsel centers on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the United States Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

Kowalski argues counsel "was not familiar with the import of *Apprendi*," (Br. of Appellant at 7) and "[t]his deficiency, admitted by a court-appointed criminal defense attorney, is, standing alone, highly prejudicial to Kowalski, and will be expounded in further detail." (*Id.*) He asserts "competent counsel, apprised of *Apprendi*, would have limited any/all of his client's statements to facts contained in the charging instruments," (*id.* at 8), and consequently he "improperly received enhanced sentences based upon

[8] Kowalski could have received up to eight years for reckless homicide, three years for dealing in marijuana, and three years for failure to appear. *See* Ind. Code §§ 35-50-2-6, -7 (2004). The sentencing court could have ordered the reckless homicide and dealing in marijuana sentences served concurrently but, under Ind. Code § 35-50-1-2(d), Kowalski's sentence for failure to appear was required to be served consecutively to the other charges. The total consecutive term Kowalski could have been subject to under Ind. Code § 35-50-1-2(c) was ten years. However, sentences for crimes of violence such as reckless homicide, Ind. Code § 35-50-1-2(a)(5), and sentences required to be served consecutively under Ind. Code § 35-50-1-2(d) such as failure to appear, are excluded from the cap.

aggravating circumstances not found by a jury beyond a reasonable doubt in light of *Apprendi*." (*Id.* at 9.)

We disagree. The "import of *Apprendi*" was not clear until the High Court decided *Blakely* in 2004, and the effect on sentencing in Indiana was not certain until our Indiana Supreme Court handed down *Smylie* in 2005.

> While *Blakely* certainly states that it is merely an application of "the rule we expressed in *Apprendi v. New Jersey*," it is clear that *Blakely* went beyond *Apprendi* by defining the term "statutory maximum." As the Seventh Circuit recently said, it "alters courts' understanding of 'statutory maximum'" and therefore runs contrary to the decisions of "every federal court of appeals [that had previously] held that *Apprendi* did not apply to guideline calculations made within the statutory maximum." Because *Blakely* radically reshaped our understanding of a critical element of criminal procedure, and ran contrary to established precedent, we conclude that it represents a new rule of criminal procedure.

Smylie, 823 N.E.2d at 687 (internal citation omitted, bracket in original). Counsel is not required to "anticipate changes in the law and object accordingly in order to be considered effective." *Id.* at 690. Requiring "counsel to have prognosticated the outcome of *Blakely*" and *Smylie* in order to preserve a *Blakely* claim "would be unjust." *Id.* at 689. Requiring counsel to anticipate the significant changes in Indiana sentencing law on the basis of *Apprendi* alone also asks too much. Accordingly, with respect to failure to raise an *Apprendi* claim at sentencing, we conclude trial counsel's performance was within the "range of competent effort that *Strickland* contemplates." *Grinstead*, 845 N.E.2d at 1031.

Kowalski's final claim concerns trial counsel's failure to cite three "opinions weighing misdemeanor aggravators," (Br. of Appellant at 8), during sentencing, "despite the significance" of the cases. (*Id.* at 7.)

> Kowalski asserts that counsel's deficiencies violated Prof. Cond. R. 1.1, which requires legal . . . [sic] "thoroughness and preparation." The transcript of Kowalski's sentencing hearing clearly demonstrates both a lack of thoroughness and preparation.
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> Kowalski, having cited numerous deficiencies of court-appointed counsel, argues that the deficiencies prejudiced him. Kowalski's prior criminal record consisted of a misdemeanor marijuana possession conviction more than five (5) years old. [Appellant's App. II at 274 L 2] [sic]. **Period**.

(*Id.* at 8.) (bold type in original).[9]

Any criminal history is "a possible and proper aggravator." *White v. State*, 756 N.E.2d 1057, 1062 (Ind. Ct. App. 2001), *trans. denied* 774 N.E.2d 505 (Ind. 2002).

[9] The State argues Kowalski "has presented no evidence to support this claim because the sentencing transcripts are not part of the present record." (Br. of Appellee at 8.) The post-conviction court indicated it took "judicial notice of its file, including the transcripts of the guilty plea and sentencing hearings." (App. at 170.) However, a post-conviction court may not take judicial notice of the transcripts of prior proceedings absent exceptional circumstances. *Bahm v. State*, 789 N.E.2d 50, 58 (Ind. Ct. App. 2003), *clarified on reh'g by* 794 N.E.2d 444 (Ind. Ct. App. 2003), *trans. denied* 804 N.E.2d 751 (Ind. 2003). Rather, transcripts must be introduced just like any other exhibit. *Id.* Accordingly, the State urges us to conclude Kowalski did not meet his burden of proof with respect to these sentencing claims because he did not properly introduce the transcripts into evidence.

The State is correct in asserting Kowalski has the burden of proof in post-conviction proceedings and must present evidence to support his petition. P-C.R. 1(5). However, the post-conviction court took judicial notice of the transcripts at the State's request and before Kowalski presented his evidence. Under the doctrine of invited error, a party may not take advantage of an error that it commits, invites, or which is the natural consequence of its own neglect or misconduct. *Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005). The State cannot base its argument on Kowalski's failure to properly introduce the transcripts into evidence and thus take advantage on appeal of an error it invited at trial.

"There is no requirement that the prior criminal history of a defendant include felonies in order to be an aggravator[.]"[10] *Id.* As the post-conviction court correctly concluded:

> 40. Kowalski argued his trial counsel rendered ineffective assistance of counsel . . . by failing to argue that the trial court could not enhance his sentence based upon a misdemeanor conviction.
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> 41. The law in Indiana in 2003, when the trial court sentenced Kowalski, permitted the trial court to consider misdemeanor convictions in sentencing a defendant. The appellate courts had cautioned trial courts, however, not to rely on misdemeanor convictions that were remote in time and were not related in any way to the instant offense. The trial court must weigh the misdemeanor convictions under all the facts and circumstances.
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> 44. Given the law in Indiana before and after this sentencing hearing, and before and after *Blakely*, Kowalski's trial counsel did not render ineffective assistance of counsel by failing to argue that the trial court could not use a misdemeanor conviction to enhance his sentence, as this was not the law.

(App. at 176-77.)

The three cases Kowalski cites are *Watson v. State*, 784 N.E.2d 515 (Ind. Ct. App. 2003), *Westmoreland v. State*, 787 N.E.2d 1005 (Ind. Ct. App. 2003), and *Newsome v. State*, 707 N.E.2d 293 (Ind. Ct. App. 2003), *trans. denied* 812 N.E.2d 729 (Ind. 2004). *Watson* and *Westmoreland* emphasize a criminal history comprised of misdemeanors *unrelated* to the present offense cannot be a *significant* aggravator. *Watson* and *Westmoreland* are not on point because Kowalski's prior misdemeanor conviction and one of his present offenses involve marijuana. *Newsome* noted a misdemeanor criminal

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[10] Nevertheless, the significance of criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." *Wooley v. State*, 716 N.E.2d 919, 929 n.4 (Ind. 1999), *reh'g denied*. "[A] criminal history comprised of a prior conviction for operating a vehicle while intoxicated may rise to the level of a significant aggravator at the sentencing hearing for a subsequent alcohol-related offense [but] this criminal history does not command the same significance at a sentencing hearing for murder." *Id.*

history could not, *standing alone*, support Newsome's enhanced sentence. *Newsome* is inapplicable because the trial court identified aggravating factors other than Kowalski's misdemeanor criminal history.[11] Kowalski has not demonstrated failure to cite these cases was deficient performance or resulted in prejudice.[12]

CONCLUSION

Kowalski waived review of the imposition of a drug interdiction fee by failing to raise the issue on direct appeal. Because his appeal was not final when *Blakely* was decided, he was entitled to challenge his sentence under *Blakely*. He forfeited this claim by not adding it to a petition for rehearing or petition to transfer. Kowalski was not denied effective assistance of trial or appellate counsel. Accordingly, we affirm the denial of Kowalski's PCR petition.

Affirmed.

BAILEY, J. and RILEY, J. concur.

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[11] In Kowalski's direct appeal, we noted: "[T]he trial court identified several aggravating factors, including Kowalski's prior criminal history—which includes a prior felony charge—Kowalski's daily drug usage and dealing activities, and the failure of the trial court's previous attempts at rehabilitative and correctional treatment for Kowalski." *Kowalski*, slip op. at 4-5.

[12] With respect to his direct appeal, Kowalski asserts: "Court-appointed appellate counsel failed to cite neither of the aforementioned Watson, Westmoreland, nor Newsome opinions." (Br. of Appellant at 10.) Failure to cite these cases did not constitute deficient performance by trial counsel or result in prejudice. Consequently, Kowalski's claim regarding appellate counsel fails for the same reasons.